

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AHMED DEMETRIC ADAMS,

Defendant-Appellant.

UNPUBLISHED

October 7, 1997

No. 194170

Oakland Circuit Court

LC No. 93-128530-FC

Before: Michael J. Kelly, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520(b)(1)(f); MSA 28.788(2)(1)(f) (penetration through force or coercion causing personal injury to the victim). The trial court sentenced defendant to 10 to 20 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erroneously scored offense variables 2 and 7, placing him in a higher guideline range. Such a challenge to the court's application of the guideline variables no longer states a cognizable claim for relief. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). Thus, we review defendant's 10 to 20 year sentence for first-degree criminal sexual conduct to determine whether it is proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 660-661; 461 NW2d 1 (1990). Defendant effectively held his minor victim captive in his automobile, terrorized her, and subjected her to a violent rape. The victim was injured in the attack. Based on these facts, we conclude that defendant's sentence was proportionate.

Defendant next argues that the trial court erroneously denied his requests for jury instructions on assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g; MSA 28.788(7) and assault and battery, MCL 750.81; MSA 28.276. We find that the evidence adduced at trial did not support giving an instruction on assault with intent to commit second-degree criminal sexual conduct. No reasonable juror could infer from the evidence that defendant assaulted the victim with the intent to sexually touch her for purposes of sexual arousal or gratification. Instead, the evidence established that

defendant intended penetration. Therefore, the trial court was not required to give this instruction. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). Furthermore, the trial court was not required to give an instruction on the misdemeanor of assault and battery, because this crime is not sufficiently related to the principal charge of first-degree criminal sexual conduct to justify the giving of the instruction. *People v Corbiere*, 220 Mich App 260; 559 NW2d 666 (1996).

Finally, defendant argues that the trial court erred when it instructed the jury on the offense of attempted first-degree criminal sexual conduct over his objection, because he was surprised by the instruction. It is improper for the trial court to instruct the jury on a cognate lesser included offense “unless the charging document gives the defendant notice that he could face a lesser offense charge.” *People v Usher*, 196 Mich App 228, 232; 492 NW2d 786 (1992) (citations omitted). However, we find that, in this case, defendant should have been on notice that such an instruction would be given, because he introduced evidence to support the giving of an attempt instruction. The elements of attempt are: “(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation.” *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). Defendant himself testified that despite his efforts, he was unable to achieve penetration. Therefore, we find that defendant’s argument on this issue is without merit.

Affirmed.

/s/ Michael J. Kelly
/s/ Myron H. Wahls
/s/ Hilda R. Gage